

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 8 - 1998

In the Matter of)
)
Policies and Rules for the) IB Docket No. 98-21
Direct Broadcast Satellite Service)

COMMENTS OF PANAMSAT CORPORATION

In the above-referenced rulemaking, the Commission has proposed to consolidate its DBS rules (which currently are codified at 47 C.F.R. Part 100) with its other satellite rules (which are codified at 47 C.F.R. Part 25), and to modify its DBS rules in some respects as part of the consolidation.¹ While many of the Commission's proposals focus specifically on DBS systems — *i.e.*, U.S.-licensed systems that use the frequencies allocated internationally to the broadcast satellite service ("BSS") — some of its proposals also would apply to direct-to-home ("DTH") services transmitted using fixed satellite service ("FSS") facilities ("DTH-FSS services").

PanAmSat Corporation ("PanAmSat") owns and operates a global FSS satellite network. Some of PanAmSat's customers provide, and others have plans to provide, DTH-FSS services, within and/or outside the United States, using capacity on PanAmSat's satellites. In addition, PanAmSat has proposed to provide DBS services outside the United States — either by itself, or through the sale or lease of capacity to third parties — via BSS satellites that it would operate in conjunction with its Ka-band system. As a result, PanAmSat has an interest, both directly and on behalf of its customers, in the proposals contained in the NPRM.

PanAmSat supports the Commission's effort to consolidate the Part 100 DBS rules with the Part 25 satellite rules. In light of the manner in which the DBS service has developed in the United States, there is no reason to retain a separate Part 100 to govern solely DBS licensees.

¹ *Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking*, IB Docket No. 98-21, FCC 98-26 (rel. Feb. 26, 1998) ("NPRM").

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PanAmSat also supports several of the Commission's specific proposals to streamline and simplify its DBS rules. In a limited number of instances, however, the Commission's proposals are unnecessary and/or would be counterproductive. PanAmSat, therefore, opposes these proposed changes.

I. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO PROVIDE GREATER TECHNICAL FLEXIBILITY TO DBS APPLICANTS.

As the Commission recognized in the NPRM, the current DBS rules prohibit DBS applicants from exceeding certain technical limits specified by the ITU, despite the fact that the ITU has created a process for approving non-conforming systems and the FCC regularly uses the coordination process to overcome potential interference problems for non-DBS satellite systems.² The current rules, therefore, unnecessarily prevent DBS applicants from deviating from the ITU rules, even where such deviations are technically sound and would not adversely affect other spectrum users.

In order to provide greater technical flexibility to DBS applicants, the NPRM proposes to permit an applicant to exceed the applicable ITU technical limits if there are "reasonable assurances" that the agreement of affected administration(s) can be obtained and the applicant provides to the FCC the technical information needed to modify the ITU BSS Plans and conduct any necessary coordinations.³

PanAmSat strongly supports this proposed change. There is no reason artificially to constrain the technical flexibility of DBS applicants. If there are reasonable assurances that a non-conforming system can be coordinated internationally, the United States should act on behalf of the applicant and, thereby, promote U.S. technological leadership and the development of innovative new systems.

II. THE COMMISSION SHOULD CLARIFY THAT CERTAIN OF ITS DBS RULES DO NOT APPLY TO ENTITIES PROVIDING SERVICE SOLELY OUTSIDE THE UNITED STATES.

In the NPRM, the Commission proposes to define "direct broadcast satellite service" with reference to the frequencies used but not with reference to

² NPRM at ¶ 45.

³ NPRM at ¶¶ 45-47.

the territory served.⁴ As a result, the DBS definition would subject all U.S.-licensed BSS systems serving ITU Region 2 to the full panoply of the FCC's DBS regulatory burdens, even if the system is not used to provide DBS services within the United States and does not use any "U.S." DBS orbital slots.⁵

Similarly, the NPRM's usage of the term "DTH-FSS" encompasses any entity that uses FSS capacity to provide a direct-to-home service, without regard to the territory served.⁶ As a result, any of the Part 25 rules that impose an obligation on a provider of DTH-FSS services would apply to any entity using U.S.-licensed FSS capacity, even if they do not provide DTH services within the United States.

Some of the Commission's DBS rules logically can and should be applied across-the-board to all U.S.-licensed systems. These rules include the FCC's technical information requirements (set forth in Sections 25.111(c) and 25.114(22)), its rules governing the terms for DBS licenses (Section 25.146(b)), its due diligence rules (Section 25.146(c)), its technical qualification rules (Section 25.146(f)), and its general inter-system coordination procedures (Section 25.272(a)).

Other existing and proposed DBS and DTH-FSS service rules make no sense when applied to an entity serving non-U.S. markets and not using "U.S." DBS slots. For example, the public interest/political broadcasting rules imposed by the 1992 Cable Act make little sense when applied to an entity serving non-U.S. markets.⁷ Similarly, the existing requirement to serve Alaska and Hawaii where technically feasible from the authorized orbital location, and the proposed requirement also to serve Puerto Rico and other U.S. territories and possessions where technically feasible, could impose an unreasonable and unnecessary

⁴ NPRM at Appendix A, proposed amendment to § 25.201.

⁵ Because the ITU has allocated different service link frequencies for Regions 1 and 3, such systems would not be covered by the current definition. Presumably, Region 1 and 3 systems could be licensed by the FCC pursuant to a waiver of rules to permit the applicant to use the appropriate regional frequencies. In such a case, the licensed system should not become subject to the full panoply of the FCC's DBS rules.

⁶ E.g., NPRM at ¶ 1.

⁷ See *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations, Notice of Proposed Rulemaking*, 8 FCC Rcd 1589 (1993), *Public Notice*, 12 FCC Rcd 2251 (1997). The Commission has not yet implemented these requirements.

burden on an entity providing non-U.S. BSS services from a non-U.S. orbital location, via a U.S.-licensed spacecraft.⁸

In a similar vein, it would be unreasonable and detrimental to U.S. interests for the Commission to enforce its equal employment opportunity rules ("EEO") extraterritorially against an entity that does not provide service within the United States.⁹ Such an application of the EEO rules could, for example, force a foreign entity that does no business within the United States, and operates from a country with a fundamentally different workforce structure from the United States, to comply with U.S. EEO rules merely because it has purchased or leased capacity on a U.S. licensed satellite. Such a requirement seems not only fundamentally inequitable and unworkable, but also could lead foreign entities seeking space segment to provide non-U.S. DTH-FSS services to avoid using any U.S.-licensed facility.

If the Commission decides to adopt any DBS ownership or cross-ownership rules, these also should not be applied to entities using U.S.-licensed capacity to provide non-U.S. services.¹⁰ There is no basis for the Commission to conclude that common ownership of a foreign DBS facility or service, on the one hand, and a U.S. cable or programming service, on the other, threatens competition in the U.S. multi-channel video programming distribution ("MVPD") market.

Finally, as the Commission has recognized in other contexts, there are a number of policy reasons that dictate that auctions generally should not be used to assign licenses for international satellite systems. For these reasons, the FCC should use all reasonable efforts to avoid the creation of mutual exclusivity and the need for auctions for non-U.S. DBS systems (*i.e.*, systems that propose to use DBS frequencies, but at non "U.S." slots and for service outside the United States), to the maximum extent permitted by law.

There are a variety of efficiencies and other benefits associated with obtaining system-wide licenses from a single licensing authority. PanAmSat, for example, has sought FCC licensing exclusively for its international FSS system.

⁸ See NPRM at ¶¶ 8, 32-34.

⁹ See NPRM at ¶¶ 28-31, Appendix A, proposed amendment to § 25.601.

¹⁰ See NPRM at ¶¶ 54-58.

The United States also benefits from its role in licensing many of the world's largest and most important satellite systems, most importantly by enabling it to retain jurisdiction over the technical characteristics of these systems and to use its licensing process to promote pro-competitive policies. In light of these benefits, licensees and potential licensees should not be discouraged from seeking U.S. licenses by having imposed on their non-U.S. services, or the non-U.S. services of their customers, rules that are illogical or unworkable in the global marketplace.

The Commission, therefore, should clarify its DBS and DTH-FSS rules to distinguish those that logically should be applied across-the-board to all U.S.-licensed systems from those that should apply only to entities providing service within the United States.

III. THE COMMISSION SHOULD NOT LIMIT THE FOREIGN OWNERSHIP OF ENTITIES PROVIDING SUBSCRIPTION DBS OR DTH-FSS SERVICES.

Sections 310(a) and 310(b) of the Communications Act of 1934, as amended, restrict the foreign ownership of U.S. radio licensees. Section 310(a) prohibits foreign governments and their representatives from owning any U.S. radio station licensee. Section 310(b) limits the foreign ownership of broadcast, common carrier, aeronautical en route, and aeronautical fixed station licensees.

Under current law, these restrictions are largely inapplicable to DBS and DTH-FSS service providers. A DTH-FSS service provider does not require any FCC license for its programming operations and, as a result, is exempt from the Section 310 limits.¹¹ FSS licensees, moreover, generally are not subject to Section 310(b)'s limits, because they do not operate on a broadcast or common carrier basis. Similarly, every DBS licensee that has been issued an FCC license to date has elected to provide service on a subscription — rather than a broadcast — basis and, therefore, has remained outside the scope of Section 310(b).¹²

¹¹ Under certain circumstances, earth station licenses may be required. In such an event, the earth station licensee — who may or may not be the DTH-FSS service provider — is subject to Section 310(a) and would be subject to Section 310(b) if it operates on a broadcast or common carrier basis.

¹² *MCI Telecommunications Corporation Application for Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 110° W.L., Order*, DA-96-1793 (Int'l Bur. 1996). An Application for Review of this order currently is pending before the Commission.

In the NPRM, however, the Commission requests comment on whether it should expand the statutory foreign ownership limits and apply these limits to all entities providing DBS or DTH-FSS services on a subscription basis.¹³ The proposed rule would track the Section 310 foreign ownership restrictions in terms of the amount of permitted foreign ownership but, apparently, would not be limited to "licensees" and, therefore, could apply to any entity using FSS or BSS capacity to provide a DTH service or a DBS service, whether inside or outside the United States.

PanAmSat opposes this proposal. Competition will be served better by rules that promote flexible investment policies than by creating new barriers to entry into the United States market. In addition, foreign ownership of DBS and DTH service providers does not present a threat to United States interests; these service providers control only a small fraction of the programming choices available to consumers.

Moreover, it would be administratively burdensome to enforce a foreign ownership limit on all DBS and DTH-FSS licensees and service providers. DTH-FSS service providers, for example, are not required to obtain an FCC license in order to provide service within the United States and, therefore, are not directly subject to the FCC's regulation. As a result, the Commission either would have to impose a new licensing requirement on DTH-FSS service providers, or would have to obligate the space station licensee to monitor the uses to which its customers put their transponders and, if any customer provides DTH-FSS services, to review the customer's ownership structure and enforce the foreign ownership restriction on an ongoing basis. Either of these options runs counter to the Commission's recent efforts to reduce regulatory burdens. Moreover, if the FCC chose the latter enforcement method, it also would have to impose a similar obligation on non-U.S. systems authorized to serve the U.S. market in order to preserve parity between U.S.- and non-U.S.-licensed systems, further increasing the complexity and burdensomeness of its regulations.

Finally, a foreign ownership limit would harm the U.S. satellite industry by artificially and unnecessarily restricting demand for transponders capable of serving the U.S. market. Restricting demand is bad for competition, and in this

¹³ NPRM at ¶ 21.

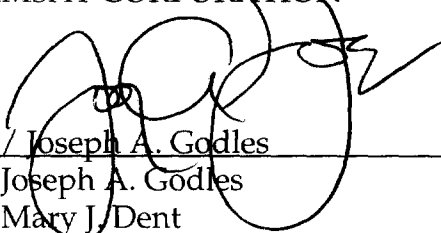
case would have a detrimental impact on diversity because consumers would see a reduction in the number of available programming services. To the extent that the Commission is committed to promoting competition in both the satellite and MVPD markets, such an outcome would be perverse.

CONCLUSION

PanAmSat supports the Commission's efforts to consolidate and streamline its DBS rules. In particular, PanAmSat supports the Commission's proposal to provide greater technical flexibility to DBS applicants. However, for the reasons stated herein, PanAmSat urges the Commission to draw a distinction between those DBS and DTH-FSS rules that logically should be applied across-the-board to all U.S.-licensed systems from those that should apply only to entities providing service within the United States. Finally, PanAmSat urges the Commission to refrain from imposing any non-statutory foreign ownership limits on entities providing subscription DBS or DTH-FSS services.

Respectfully submitted,

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April 6, 1998